IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 5604 OF 2005

B. Pankaj & Co. ...Applicant

V/s.

Swift Chemicals Ltd. & Ors ...Respondents

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Mr. H.V. Kode i/b J.P. Yagnik, Advocate the applicant.

Mr. B.H. Mehta, A.P.P. for the State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 25.10.2005

DATE OF PRONOUNCING THE ORDER : 28.10.2005

P.C.:-

1. Heard the learned advocate for the applicant i.e. original complainant and the learned A.P.P. for the State. None appears for respondents i.e. original accused though served.

2. The applicant (original complainant) had filed a complaint against the respondent Nos 1 and 2 under Section 138 of the Negotiable Instruments Act. The said complaint was filed in the Court of learned Additional/Chief Metropolitan Magistrate, 28th Court, Esplanade, Mumbai and the said complaint was numbered

as C.C. No. 492/SS/2003.

3. On 28.6.2005 as both the parties and their counsel were absent, due to absence of the complainant, the learned Special Metropolitan Magistrate & Small Causes Court Judge, Mumbai dismissed the complaint and acquitted the accused (respondents). Being aggrieved by the dismissal of the complaint, the original complainant has preferred the present Criminal Application.

4. The learned advocate for the applicant has submitted that the complainant was absent only on one date and the case came to be dismissed. Hence, the complaint may be restored. The learned advocate for the applicant has further submitted that the case was transferred from 28th Court Esplanade, Mumbai to the Court of Special Metropolitan Magistrate at Small Causes Court on 13.4.2005. As the complainant was not aware that the case was transferred to the Small Cause Court, on 28.6.2005 he could not remain present before the said Court. It is in this circumstances the complaint came to be dismissed. He has placed reliance on the decision of the Supreme Court in the case of **Mohd. Azeem Vs. A. Venkatesh & Anr, 2003 (1) Bom. C.R. 524.** In the case of Mohd. Azeem in para 4 it has been observed as under:-

> "In our opinion, the learned Magistrate and the High Court has adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant."

5. In the present case also, I am of the opinion that sufficient cause has been shown for absence of the complainant on 28.6.2005. In this view of the matter, the order of the learned Magistrate dated 28.6.2005 dismissing the complaint is set aside and the complaint is restored to file.

6. Application is disposed of.

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